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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 458

In the Matter
of

CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, STATE OF FLORIDA; TAMPA BAY GARDEN APARTMENTS, INC., ET AL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a writ of certiorari issue to review the holding of the United States Court of Appeals for the Fifth Circuit, entered in this cause.

OPINIONS BELOW

The District Court delivered an opinion on March 27, 1958, reported in 161 F Supp 424. A copy is appended as Appendix I.

The opinion of the Circuit Court of Appeals appeared under the following style: In Re: United States of America Praying for a Writ of Mandamus or Writ of Prohibition. That opinion was rendered on August 1, 1958. A copy of said opinion is appended as Appendix II. No judgment was entered thereon and no mandate issued.

JURISDICTION

The opinion of the Circuit Court of Appeals was dated August 1, 1958.

Jurisdiction to issue the writ rests on Title 28, U.S.C., §1254.

QUESTIONS PRESENTED

I. DID THE CIRCUIT COURT DETERMINE AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY CONSIDERED OR RULED UPON BY THIS COURT OR THE COURTS IN OTHER CIRCUITS?

II. DID THE CIRCUIT COURT OF APPEALS DEPART FROM ACCEPTED JUDICIAL PROCEEDINGS IN HOLDING THAT THE DISTRICT COURT WAS WITHOUT POWER TO FIX THE TIME WITHIN WHICH AND THE TERMS UPON WHICH POSSESSION SHOULD BE SURRENDERED, WHERE AN ADMINISTRATIVE ESTI-

MATE OF COMPENSATION SET OUT IN A DECLARATION OF TAKING AND DEPOSITED IN THE COURT REGISTRY, IS TIMELY CHALLENGED BY A PRIMA FACIE SHOWING OF BAD FAITH DETERMINATION?

III. DID THE CIRCUIT COURT OF APPEALS DEPART FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND CONTRAVENE DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS IN REVIEWING BY A WRIT OF MANDAMUS OR PROHIBITION A NON-APPEALABLE INTERLOCUTORY ORDER?

STATUTES INVOLVED

The following statutes are involved:

Federal Statutes:

Title 40 U.S.C. §258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation

finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c.307, §1, 46 Stat. 1421."

STATEMENT OF THE CASE

For convenience and brevity, Tampa Bay Garden Apartments, Inc., and Tampa Bay Manor, Inc., Defendants below, will herein be referred to as Petitioners and the United States, Petitioner below, will be referred to as the United States or the Government.

This cause was commenced by the United States with the filing of a declaration of taking on January 27, 1958, in the United States District Court for the Southern District of Florida at Tampa. This declaration sought immediate possession of the leasehold interest of the Petitioner Tampa Bay Garden Apartments, Inc., consisting of a Wherry Housing Project with improvements containing 550 units, for which interest the declaration set forth the estimate of $65,000.00; in addition, the declaration sought immediate possession of the similar adjacent leasehold interest of Petitioner Tampa Bay Manor, Inc., consisting of a Wherry Housing Project with improvements, containing 250 units, for which interest the estimate of $35,000.00 was set

forth. Both projects are located within the federal enclave of MacDill Air Force Base. Simultaneously the aggregate of these estimates, $100,000.00, was deposited with the Clerk of said Court. The declaration of taking was executed on behalf of the Air Force of the United States by the Assistant Secretary of the Air Force, Lyle S. Garlock. The Declaration stated (R p. 59):

> "The sum *estimated* by the undersigned as *just compensation* for the interest hereby taken in the land, with all buildings and improvements thereon and all appurtenances thereto, is set forth in Schedule 'A' herein, which sum the undersigned causes to be deposited herewith in the Registry of the Court for the use and benefit of the persons entitled thereto. The undersigned is of the opinion that the ultimate award for said interests probably will be within any limits prescribed by law as the price to be paid therefor." (Emphasis supplied.)

Ex parte, without notice, the Assistant United States Attorney sought to secure an Order of Possession. The Court, however, afforded counsel for the Petitioners an opportunity to be heard, before considering the matter.

Complaint in condemnation was filed by the United States two days after the declaration, on January 29, 1958, and was met by a verified motion on behalf of Petitioners to vacate the declaration and to prevent the entry of an Order of Possession. Attached thereto, as an exhibit, was an estimated valuation of the property sought to be condemned, which had been determined by a responsible spokesman for the United States prior to the condemnation action. This exhibit consisted of a letter from Robert A. McDonald, Acting Assistant Secretary of Defense, requesting approval from the

Committee on Armed Services of the United States Senate for acquisition of the Wherry housing units owned by these Petitioners; a project data sheet attached to this letter showed that the estimated cost of acquiring the properties of Petitioners was $1,617,917.00. Unlike the nominal $100,000.00 deposit accompanying the declaration, the Government's $1,617,917.00 appraisal was calculated and submitted to the Committte pursuant to an established statutory scheme. A parenthetical resume of the statutory provisions prompting this appraisal and the request to acquire is essential for a full comprehension of the undisputed evidence attached to Petitioners' motion.

The 84th Congress, Second Session, adopted Public Law 1020. Section 512 of that Act, amending Section 404 of the Housing Amendments of 1955 (42 U.S.C. §1594a), authorized the Secretary of Defense or his designee to acquire Wherry Housing Units, by negotiation or purchase pursuant to a formula approved by Congress; upon the failure of negotiation authority was provided for condemnation proceedings to acquire such housing units. The same session of Congress enacted Public Law 968, Section 419 which, in substance, required the Secretary of Defense to submit to the Armed Services Committees of the Senate and House a written report stating his intent to acquire such housing units and the estimated cost thereof. The record here shows that, pursuant to these laws, Mr. Robert A. McDonald, Acting Assistant Secretary of Defense (Properties and Installations), on July 12, 1957, directed his letter to Honorable Richard B. Russell, Chairman of the Committee on Armed Services of the United States Senate, stating that the Department of the Air Force proposed to acquire the Wherry housing units owned by these Petitioners within the formula price of the applicable

statute (R p. 63). Attached to Mr. McDonald's letter was a statement of project data showing that within the formula contained in Public Law 1020, the estimated cost of acquiring the properties of these Petitioners was $1,617,917.00 (R p. 65).

The formula contained in Public Law 1020, which formed the basis for Mr. McDonald's appraisal, provides that, upon request of the Secretary of Defense, the FHA Commissioner would determine the price to be paid for the interest in such Wherry military housing. The Act specifies that the Commissioner would use his estimate of replacement cost as of the date of formal endorsement for mortgage insurance, reduced by the value of improvements installed or constructed with appropriated funds, or the actual cost as defined if such cost is less than the Commissioner's estimate. The Commissioner would then adjust his estimate to current costs using cost indexes available to him, and this amount would then be reduced by an appropriate allowance for physical depreciation. According to this formula the amount remaining would represent the purchase price of the Wherry military housing project. This lengthy explanation of the formula is given here to assist the Court in identifying references used in the letter of Assistant Secretary McDonald, and comprehending the calculations employed for determining that the value of Petitioners' interests was $1,617,917.00.

The Department of Defense recognized that use of the formula for determining purchase price for Wherry housing units was superior to independent appraisals. On May 25, 1956, the Assistant Secretary of Defense, by and through Richard A. Buddeke, Director of its legislative program, directed a letter to the Honorable Brent Spence, Chairman of the House of Representatives

Committee on Banking and Currency, in which he stated that the Department of Defense supported the formula adopted by the Congress and believed that the formula method was the most desirable means of appraisal. (Hearings before Committee on Banking and Currency, House of Representatives 84th Congress, Second Session on H.R. 10157, p. 185.)

At the hearing on the foregoing motion before the District Judge, the Petitioners exhibited to him and filed in evidence a letter dated December 23, 1957, addressed to Petitioners' representative, from Lt. Col. James B. Porter, U.S.A.F., the officer in charge of acquisition of Wherry Housing Projects for the Department of the Air Force. Therein Colonel Porter stated that (R p. 69): "... the Air Force at this time estimates the value of your leasehold interest in the referenced Wherry project to be $1,080,000.00." Such letter contained the following unequivocal offer (R. p. 69):

> "Mr. John M. Ferry, Special Assistant for Installations, Hq U. S. Air Force, has authorized the undersigned to offer you the above amount on deferred payment plan as follows: Twenty-five per cent as of date of closing and balance to be paid in three (3) annual installments of 25% bearing 4% interest on unpaid balances."

Thus, at the time of such hearing, beyond cavil and dispute, this record shows that the acquiring agency of the condemnor, through different spokesmen, had written to the Armed Services Committees of Congress, and had made a firm offer to the Petitioners, in each instance, of sums far in excess of the $100,000.00 deposited in Court with the declaration of taking. Significantly, the United States made no proffer of any evidence at the hearing on the value of the leasehold sought

to be appropriated. At the close of the hearing, the following colloquy took place between Mr. Nunez, Assistant United States Attorney, and the Court (R p. 66):

"The Court: I was going to say, there is such a wide disparity here—

Mr. Nunez: Yes.

The Court: —the Court can't do anything with this case. One part of the Government says it is a million and some odd, and another one says a hundred thousand.

Mr. Nunez: Actually, Your Honor, it is the same part. Both these letters are from the Air Force.

The Court: They are going to have to reconcile that before the Court will issue an Order of Possession.

Mr. Nunez: *Well, I think they should.* (Emphasis supplied).

The Court: I think you agree with me on that.

Mr. Nunez: Yes Sir.

The Court: If there is a Motion for an Order of Possession we will deny that if there is. Deny possession and let the declaration of taking stand with leave for them to amend if they can to get it in shape here.

Mr. Nunez: All right, Sir.

The Court: To show that all the conditions precedent have been complied with and that they are entitled to an Order of Possession."

On February 24, 1958, the United States filed amendment to its Complaint in condemnation, and on March 3, filed amendment to the declaration of taking.

Simultaneously with the latter, it also deposited with the Clerk of the Court the additional sum of $300,500.00 as its estimated just compensation. The amended declaration of taking was attacked by the Petitioners with a further motion.

The District Judge held a hearing upon the foregoing pleadings on March 24, 1958. At the hearing, the United States again failed to offer any evidence at all concerning the value of the leasehold interest sought to be condemned. The Government continued to be confronted before the Court with the following inexorable facts, displaying the fantastic divergence of values which, insofar as Petitioners are concerned, were unilaterally and voluntarily determined by reputable representatives of the same governmental agency within a period of nine months:

JULY 12, 1957	VALUE	$1,617,917.00
DECEMBER 23, 1957	VALUE	1,080,000.00
JANUARY 27, 1958	VALUE	100,000.00
MARCH 3, 1958	VALUE	400,500.00

On March 27, 1958, the District Court filed its opinion in which it denied the Motion to Dismiss, and granted the Motion to vacate the declaration of taking. The District Judge frankly stated that under no theory could the Court hold that the sum of $400,500.00 was just compensation arrived at in good faith for the taking of Petitioners' leasehold interest. On the same day the District Judge entered an Order implementing the opinion, but allowing the United States sixty days in which to file an amended declaration of taking, consonant with

the Court's opinion. The United States did not avail itself of the privilege to amend, but instead on April 7 filed its Motion to Set Aside the Court's Order, and for rehearing thereon. This Motion was denied by the Court on May 12.

Subsequently, the United States filed in the Circuit Court of Appeals for the Fifth Circuit a unique pleading entitled: "Appeal From the United States District Court from the Southern District of Florida; Motion to Reverse, Application for Leave to File Petition for Writ of Mandamus or Prohibition with Petition Attached, and Brief and Appendix for United States in Support of Motion and Application." On June 12, the Circuit Court of Appeals entered an Order granting leave for the filing of such application, and permission to the District Judge to file an Answer to the Application, with privilege of briefs and replies. The District Judge filed his Answer and accompanying Brief on June 30; the United States replied thereto on July 2, and the District Judge answered such reply on July 15. Thereafter and without oral argument, the Circuit Court of Appeals delivered its opinion dated August 1, 1958. This Petition for Writ of Certiorari to review the latter opinion follows.

REASONS FOR ALLOWANCE OF WRIT

I. THE CIRCUIT COURT DETERMINED AN IMPORTANT QUESTION OF FEDERAL LAW NOT PREVIOUSLY CONSIDERED OR RULED UPON BY THIS COURT OR THE COURTS IN OTHER CIRCUITS.

In their motion to vacate the declaration of taking as amended, filed in the District Court on March 19, 1958, Petitioners contended that the $400,500.00 deposit

paid by the Government into the Registry of the Court did not constitute a good faith estimate of just compensation. In support of this motion Petitioners presented evidence showing that agents of the acquiring authority had estimated the value of the property sought to be condemned at $1,617,917.00 on July 12, 1957, and at $1,080,000.00 on December 23, 1957. This motion and the uncontroverted evidence of record before the District Court at the hearing thereon squarely challenged the good faith of the deposit made by the acquiring authority. The opinion of the District Court rendered on March 27, 1958, focused on this issue, holding that the sum of $400,500.00 could under no theory be considered as just compensation arrived at in good faith. (Appendix I at p. 5.)

As a necessary corollary to this conclusion, the District Court determined that it had the jurisdiction to deny immediate possession to the Government under the express terms of the Declaration of Taking Act Title 40, §258a U.S.C. until such time as a deposit was made which bore a reasonable relation to the value of the property sought to be taken. (Appendix I at p. 4.) The District Judge afforded the United States two opportunities to make such a deposit.

The opinion of the Circuit Court of Appeals recognized that the controlling issue before it was identical to the question considered by the District Judge below, to-wit, whether the Courts have the jurisdiction to withhold possession where a deposit paid into the Registry of the Court has been directly and timely challenged by a prima facie showing of bad faith. On this crucial question the opinion states: (Appendix II at p. 12.)

> "With deference to the contrary views of the district judge, we deem the settled law to be that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist, that, in short, the courts have no jurisdiction to review the amount of estimated compensation, none to set aside or vacate a declaration of taking, none to refuse a declaration of possession on the grounds asserted here."

No court has heretofore supported such a contention. No decision under the Act can be cited to support directly the assertion of the Circuit Court that its holding is "settled law." Since the passage of the Act in 1931, many courts have ruled upon various other aspects of the Act, but none has previously held that the Act divests the Courts of all power to review judicially the administrative action where compliance with the requirements of the Act has been challenged by a prima facie showing of bad faith. The only Court to consider this point: *(United States v. 44.00 Acres of Land,* [DC NY] 110 F Supp 168), said (at page 171):

> "It is fundamental that the courts may require compliance with the statute when the Government elects to resort to the statutory method of acquiring title. If an acquiring authority should file a declaration of taking containing a statement of estimated just compensation on its face plainly inadequate, such as a mere nominal sum for property described in the declaration, and should deposit such nominal sum in court, the owner would not be without a remedy to review by judicial inquiry such an arbitrary act of an acquiring authority amounting to non-compliance with the statute. In such an extreme case it would be readily apparent that the purpose of the statute was being thwarted by arbitrary governmental action, by mere simulated or token compliance with the statute. It is true

> that no such extreme case is involved here, but the defendant nevertheless has charged lack of good faith in the Government's estimate of just compensation and has supported the charge by affidavit making a prima facie showing of non-compliance with the statute."

This District Court was subsequently reversed on appeal having refused to consider an amended declaration already filed, which raised the estimate to a sum arrived at in good faith. Without directly deciding the issue, the Court of Appeals conceded, arguendo, that "a court has jurisdiction to vacate a Declaration of Taking where, contrary to the implied requirements of the statute, the estimate of the value of the condemned property is made by the Government in bad faith." (CA 2 NY) 234 F2d 410, 415. Dicta, in other decisions, has recognized that the good faith requirement is inherent in the Act. *United States v. 51.8 Acres of Land,* (DC NY) 147 F Supp 356; *Lee v. United States,* (CA DC) 58 F2d 879; *United States v. 72 Acres of Land,* (DC CAL) 37 F Supp 297.

Petitioners respectfully urge that, in directly holding that the landowner may not invoke judicial assistance even though the action of the acquiring authority is in bad faith, the Circuit Court of Appeals has determined an important question of federal law for which no prior authority exists; further, in so holding, the Circuit Court of Appeals has given a dangerous latitude to the powers of an acquiring authority proceeding under the Declaration of Taking Act, which is fraught with obvious risk of abuse.

II. THE CIRCUIT COURT OF APPEALS DEPARTED FROM ACCEPTED JUDICIAL PROCEEDING IN HOLDING THAT THE DISTRICT COURT WAS WITHOUT POWER TO FIX THE TIME WITHIN WHICH AND THE TERMS UPON WHICH POSSESSION SHOULD BE SURRENDERED, WHERE AN ADMINISTRATIVE ESTIMATE OF COMPENSATION SET OUT IN A DECLARATION OF TAKING AND DEPOSITED IN THE COURT REGISTRY, IS TIMELY CHALLENGED BY A PRIMA FACIE SHOWING OF BAD FAITH DETERMINATION.

The opinion of the Circuit Court of Appeals renders nugatory the express language of the Act. Title 40 U.S.C. §258a, (the Declaration of Taking Act) sets forth the procedure by which a condemning authority can acquire possession and title to property in advance of final judgment. Title passes when the owner receives compensation or when compensation is deposited into Court. *United States v. Dow*,—US—, 2 L ed 2d 1109, 78 S Ct—. The Act contains no restriction on the right of the owner to challenge the validity of the taking for the condemnor's failure to proceed as prescribed in the Act. *Catlin v. United States*, 324 US 229, 89 L ed 911, 65 S Ct 631. Significantly here, the Act requires the United States to set out in its declaration of taking a statement of the sum of money estimated by the acquiring authority to be *just compensation* for the land taken. A mass of authorities have firmly established the doctrine that in considering the language of the legislative act, the Court will presume that the enacting body intended to employ the words used therein with their accepted meaning and connotation. *Old Colony R. Co. v. Comm'r Internal Revenue*, 284 US 552, 76 L ed 484, 52 S Ct 211. The Fifth Amendment of the Constitution of

the United States provides that private property shall not be taken for public use without "just compensation." This Court on numerous occasions, and recently in *United States v. Miller*, 317 US 369, 87 L ed 336, 63 S Ct 276, has held that the term "just compensation" in the Fifth Amendment means the full and perfect equivalent in money of the property taken, and that the owner shall be put in as good position pecuniarily as he would have occupied if his property had not been taken. By selecting the words "just compensation" to describe the amount of the deposit payable into Court, Congress presumptively intended to convey into the Act the full import and significance of these words in the Fifth Amendement. *United States v. Merriam*, 263 US 179, 68 L ed 240, 44 S Ct 69. Indeed, the statutory history of this Act makes it abundantly clear that Congress contemplated that the estimate of just compensation would be the responsibility of one who knows value or is in a position to certify truthfully to value. (See *United States v. Certain Lands*, 39 F Supp 91 (DC NY), note at p. 93 et seq.)

In deciding that the deposit is unimpeachable, the Circuit Court of Appeals permitted the acquiring authority to make a mere token deposit, even though its calculated value of the property sought to be taken was substantial. In *United States v. Miller*, supra, this Court recognized that one of the purposes of the declaration of taking Act was to give the landowner the immediate use of cash approximating the value of his land. Such minimum protection is essential to prevent the impairment of property rights, and the relegation of such rights to the whim of administrative fiat. While it is true that the statute seeks to provide merely interim compensation

pending final adjudication and guarantees the owner a payment of six per cent interest per annum on the difference between the amount deposited and the amount of the final award, such remuneration alone is not a substitute for "... immediate use of cash approximating the value of his land." *United States v. Miller,* supra, 317 US at page 381. Where, as in this case, the deposit paid into court by the Government is only a fraction of the value ascertained by responsible officials of the Government, the owner is denied the use of capital from the date of taking, through prolonged litigation, to the date of final judgment and award. In a spiralling inflation, the owner could not recoup his former position, and is compelled to invest his capital in a venture not of his own choosing and one bearing a unilaterally predetermined rate of return. If, as the Circuit Court of Appeals suggests, no court can require a deposit reasonably commensurate with actual value, it is pure sophistry to contend that the loss of immediate cash assets is fully compensated by the interest provision. Moreover, such an interpretation frustrates the intent of the Act which plainly contemplates that the fair cash market value paid into court becomes a substitute for the property taken. This substitution of cash for property is the basis for the holding that outstanding liens existing against the property attach to the deposit paid into the court. *United States v. 150.29 Acres of Land,* (CA 7) 135 F2d 878.

Petitioners recognize that in addition to providing the owner with immediate cash approximating the value of his land, the Act is designed to give the Government an expeditious and necessary procedure by which to obtain immediate possession and title. *United States v. Miller,* supra. Provisions for the vesting of title and

possession are, however, not self-executing. According to the terms of the Act title vests only upon the deposit in the court "of the amount of the estimated compensation stated in said declaration." As already indicated, the amount of compensation stated in the declaration must be "the sum of money estimated by said acquiring authority to be *just compensation* for the land taken." (Emphasis supplied.) It follows that the deposit of estimated *just compensation* is a condition precedent to the vesting of title in the United States. It is a salient fact that the declaration of taking signed by the Assistant Secretary of the Air Force certified that the money deposited in the Registry of the Court, constituted a sum estimated as "*just compensation* for the interests hereby taken." (Emphasis supplied.)

The District Court also has general discretionary power to limit the right to immediate possession. The final paragraph of Section 258a contains the following specific grant of judicial authority:

> "Upon the filing of a declaration of taking, *the Court shall have the power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner.*" (Emphasis supplied.)

Undoubtedly the practical value of the Declaration of Taking Act could be impaired if a Court dogmatically substituted its own estimate of value for the just compensation determined by the acquiring authority. The District Judge in this case did not substitute his judgment of valuation; indeed, the gross disparity between the deposit and the value was of the Government's own making. The record demonstrates that responsible agents of the Government voluntarily determined valua-

tions of $1,617,917.00 and $1,080,000.00, and despite the same, subsequently made a deposit of only $400,500.00. The District Judge sought simply to reconcile the Government's deposit with the Government's own judgment of value, and in such effort received no aid from the United States by way of testimony or evidence in explanation.

Petitioners submit that where the challenge and prima facie showing of shocking disparity, as here, is apparent from the independent acts of the Government itself, and the owner has submitted no disputatious valuations, there is no possibility for substituted judgment by the District Judge, or by the owner, as to the amount of the estimate. If distinction is to be made, let it be made on this state of facts.

It is earnestly contended by Petitioners that the Circuit Court of Appeals departed from accepted judicial proceeding in rendering nugatory the express meaning of the aforementioned statutory provisions and frustrating its purpose as enunciated by this Court.

III. THE CIRCUIT COURT OF APPEALS DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND CONTRAVENED DECISIONS OF THIS COURT AND THOSE OF OTHER CIRCUITS IN REVIEWING BY WRIT OF MANDAMUS OR PROHIBITION THE NON-APPEALABLE INTERLOCUTORY ORDER OF THE DISTRICT COURT.

Absent statutory exception, no appeal lies from an interlocutory order. The decisions of numerous courts have expressly disapproved the fragmentary adjudi-

cation of suits in condemnation. *Catlin v. United States*, 324 US 229, 89 L ed 911, 65 S Ct 631; *United States v. Kansas City* (CA 10) 159 F2d 125.

In §1292 of Title 28, U.S.C., Congress has expressly enumerated the proceedings in which the Courts of Appeal shall have jurisdiction to entertain review of interlocutory decisions. This section does not provide for interlocutory appeals in condemnation cases.

While it was agreed by all that the order entered by the District Court was interlocutory and not appealable (p. 8, Appendix II), the Circuit Court sanctioned relief from this restriction by resort to the alternative Writ of Mandamus or Prohibition. Petitioners submit that in permitting the Government to accomplish by indirection that which is prohibited directly, the Court of Appeals departed from accepted course of judicial proceeding and squarely contravened the decisions of this court and those standing as authority in other circuits. *Ex parte Fahey*, 332 US 258, 91 L ed 2041, 67 S Ct 1558; *Columbia Boiler Co. of Pottstown, Inc., v. Hutcheson*, (CA 4) 222 F2d 718; *Roche v. Evaporated Milk Association*, 319 US 21, 87 L ed 1185, 63 S Ct 938; *Gulf Research and Development Co., et al, v. Leahy, et al*, (CA 3) 193 F2d 302, aff'd 344 US 861, 96 L ed 1062, 72 S Ct 842; *In re Sylvania Electric Products, Inc.*, (CA 1) 220 F2d 423.

It is apparent from the language of the opinion that the Circuit Court allowed the premature consideration of this order on the wholly erroneous basis that notwithstanding a manifest showing of non-compliance and abused discretion, a declaration of taking once filed is beyond the pale of judicial control. Petitioners have already emphasized that neither the Act itself nor

prior decisions thereunder sustain such a holding. Petitioners contend that in the absence of established authority on this jurisdictional point, the exercise of jurisdiction by the District Judge was not palpably excessive. Where jurisdiction is merely in doubt and substantial legal argument can be made in support of the ruling, the case is not appropriate for the alternative writ, even though on normal appeal a court might find reversible error. *American Airlines, Inc., v. Forman,* (CA 3) 204 F2d 230, cert. denied 346 US 806, 98 L ed 336, 74 S Ct 54; *In re Illinois Central R. Co.,* (CA 5) 192 F2d 465; *Wabash R. Co. v. Duncan,* (CA 8) 170 F2d 38, cert. denied, 336 US 904, 93 L ed 1068, 69 S Ct 490; *Massey-Harris-Ferguson, Limited, v. Boyd,* (CA 6) 242 F2d 800 cert. denied 355 US 806, 2 L ed 2d 50, 78 S Ct 48.

No extraordinary circumstances were before the Circuit Court of Appeals to warrant the granting of extraordinary relief. On the contrary, the rights of the Government were fully protected; an effective and expeditious avenue of relief was at all times available. On two occasions, the District Judge offered the Government opportunity to amend its declaration of taking and place in the Registry of the Court a sum commensurate with its own valuation of the property sought to be acquired. Had the Government chosen to avail itself of this privilege, immediate possession and title would have vested by virtue of the provisions in the Act. In addition, it should be noted that such a deposit is subject to the control of the Court throughout the proceeding until final disposition of the case. *United States v. Miller,* supra. The making of an additional deposit approximating the actual value would also reduce the interest payments taxable against the Government in

the event that the final award exceeds the deposit. Since the interim order entered here in no way jeopardized the appellate jurisdiction of the Circuit Court of Appeals, review was available ultimately at the conclusion of the proceedings. Thus by compliance, the Government would have secured immediate possession and title and preserved review of the order entered until final adjudication. The prompt redress available under the Act, coupled with the remedy of appeal upon final judgment, made interlocutory review by mandamus or prohibition unnecessary and improper. No circumstances were present to justify the departure from the statutory mandates controlling appeals from interlocutory orders. *Roche v. Evaporated Milk Association,* supra; *Black v. Boyd,* (CA 6) 248 F2d 156; *Ex parte Fahey,* supra.

CONCLUSION

The Circuit Court of Appeals erroneously determined an important question of federal law not heretofore ruled upon or settled. The premature consideration of this interlocutory order was contrary to accepted judicial procedure and to the decisions of this Court and the courts in other circuits. Such determination, if allowed to stand, could work inordinate hardship on condemnees and gravely impair their rights. Petitioners verily believe the vital importance of this question will increase with the number and variety of Government projects.

It is prayed, therefore, that this Court exercise its power of supervision by reviewing and reversing the opinion of the Circuit Court of Appeals, thereby allowing Petitioners the right to interim compensation reasonably commensurate with the value of properties taken.

Respectfully submitted,

CHESTER H. FERGUSON

JOHN M. ALLISON

Attorneys for Petitioners

APPENDIX I

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE
SOUTHERN DISTRICT OF FLORIDA
TAMPA DIVISION

No. 3310 Civil-T.

UNITED STATES OF AMERICA,

Plaintiff.

v.

CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, STATE OF FLORIDA; TAMPA BAY GARDEN APARTMENTS, INC., ET AL,

Defendants.

OPINION

BARKER, District Judge:

This is a suit wherein the United States seeks to acquire two housing projects located at MacDill Air Force Base, Florida, under Public Law 1020, 84th Congress, 2nd Session.

The interest to be acquired by the United States being the leasehold interests of the Defendants, Tampa Bay Garden Apartments, Inc., and Tampa Bay Manor, Inc., covering the various properties described in the Complaint, as amended, and Declaration of Taking, as

amended. The matter is now before the Court upon Motion of the Defendants, Tampa Bay Garden Apartments, Inc., and Tampa Bay Manor, Inc., to Dismiss the Complaint, as amended, and to Vacate the Declaration of Taking, as amended.

The Court is of the opinion that the Motion to Dismiss the Complaint, as amended, should be denied. It is further of the opinion that the Motion to Vacate the Declaration of Taking, as amended, should be granted for the reasons hereinafter set forth.

The basis for the above named Defendants' attack on the Declaration of Taking, as amended, is that the sum of money deposited with the Declaration of Taking, as amended, is not just compensation arrived at in good faith for the property of said Defendants sought to be taken by the United States. That the Court has jurisdiction to determine whether the amount of deposit is just compensation arrived at in good faith is well settled. (U.S. v. 400 Acres of Land, 110 F. Supp., 168 and 234 F. 2, 410, and cases cited therein.)

The Court in arriving at its opinion that the Motion to Vacate the Declaration of Taking, as amended, should be granted reviewed the allegations of the pleadings and the documentary evidence submitted in chronological order. It appears from the evidence that the United States followed a certain procedure, including an offer to purchase by contract, the property, the subject matter of this cause.

On July 12, 1957, Robert A. McDonald, Acting Assistant Secretary of Defense, wrote to the Chairman of the Committee on Armed Services, United States Senate, submitting a report on the acquiring of the projects involved in this cause, wherein the

value of the interest sought to be taken is stated to be $1,617,917.00

On August 21, 1957, the said Committee wrote to the Assistant Secretary, stating it had no further questions to ask pursuant to Section 419, Public Law 968, 84th Congress.

On December 23, 1957, James B. Porter, Lt. Colonel, U. S. Air Force, Chief, Wherry Acquisition Group, wrote to Albert G. McCarthy (An officer of the two defendant corporations) wherein the Air Force offered the said Defendants for their leasehold the sum of 1,080,000.00

On December 30, 1957, McCarthy wrote to the aforesaid Porter, declining the above offer.

On January 27, 1958, a Declaration of Taking was filed in this Court, signed by Lyle S. Garlock, Assistant Secretary of the Air Force, wherein it was stated that just compensation for the two projects was the sum of ..... $ 100,000.00

This compensation was further fixed by a letter from the said Garlock to the Attorney General under date of January 17, 1958. The said sum was deposited with the Clerk of the Court. Two hearings were had on the sufficiency of the Complaint and Declaration of Taking. After the hearings it was decided, without order of but with consent of the Court, that the United States could amend its pleadings. During the two hearings the United States did not offer any evidence or appraisal to substantiate the allegation of just compensation. Thereafter the Complaint and Declaration were amended.

On March 3, 1958, an Amended Declaration of Taking was filed signed by Lyle S. Garlock, Assistant Secretary of the Air Force, in which it is stated that the just compensation for the property sought to be taken is ..... $ 400,500.00

The above Defendants filed Motions to Dismiss the Complaint, as amended, and to Vacate the Declaration of Taking, as amended.

It is these latter Motions that are now before the Court. At the hearing thereon the above Defendants contended the compensation stated in the Declaration of Taking, as amended, was not just compensation arrived at in good faith for the properties involved, stressing the evidence outlined. During the oral argument the United States, through its counsel, referred to an appraisal that would sustain the compensation set out in the Declaration of Taking, as amended, but no such appraisal was offered in evidence or submitted to the Court for inspection. It is the Court's belief that the words "just compensation" should be taken as meaning what they indicate in normal every day conversation. From the above outline of the pleadings and evidence it is apparent that the United States, in this matter, has suffered an unusual vacillation of positions. In spite of this vacillation of the United States, it offers no explanation whatsoever to sustain or warrant its Declaration of Taking, as amended, for the compensation therein set forth. It is well to bear in mind that the above evidence in regard to the value of the interest sought to be taken are the statements of officers of the United States, not evidence submitted by the Defendants in question. The conflicting positions of the United States in regard to the value of the interest in the properties is strikingly made to appear by the following valuations determined by the United States and the dates they were made:

July 12, 1957	Value	$1,617,917.00
December 23, 1957	Value	1,080,000.00
January 27, 1958	Value	100,000.00
March 3, 1958	Value	400,500.00

In view of the above evidence, the Court could under no theory hold that the sum of $400,500.00 was just compensation arrived at in good faith for the taking of the above Defendants' interest in the properties described in the Complaint, as amended, and in the Declaration of Taking, as amended.

Order in accordance with this opinion will be entered.

Dated in Tampa, Florida,
this the 27th day of March, 1958.

APPENDIX II

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17267

IN RE:
UNITED STATES OF AMERICA PRAYING FOR A WRIT OF MANDAMUS OR WRIT OF PROHIBITION.

Petition for Writ of Mandamus or Prohibition to the United States District Court for the Southern District of Florida.

(August 1, 1958.)

Before HUTCHESON, Chief Judge, and JONES and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: This is a petition for mandamus or prohibition to compel the district judge to set aside an order[1] vacating a declaration of taking, as amended, entered by him in a condemnation proceed-

---

[1] Order:

"This cause coming on to be heard upon motion of the defendants, Tampa Bay Garden Apartments, Inc. and Tampa Bay Manor, Inc. to dismis the complaint, as amended, and to vacate the declaration of taking, as amended,

ing,[2] and to proceed to enter an appropriate order grant-

filed herein, and the court having heard argument of counsel for the respective parties, having examined the pleadings and evidence submitted, and being fully advised in the premises, it is thereupon—

"Ordered and Adjudged that the motion of the said defendants to dismiss the complaint, as amended, be, and it is hereby, denied.

"It is further Ordered that the motion of said defendants to vacate the declaration of taking, as amended, be, and the same is hereby granted and said declaration of taking, as amended, is hereby vacated.

"It is further Ordered and Adjudged that the United States is hereby allowed sixty days in which to file an amended declaration of taking.

"Done and Ordered in Tampa, Florida, this the 27th day of March, 1958."

---

[2] This is the record. On Jan. 29, 1958, a declaration of taking having been filed and a deposit of $100,000 as estimated compensation having been made, the United States, in No. 3310, Civil, in the United States District Court for the Southern District of Florida, filed a complaint in condemnation to acquire lessees' interest in so called "Wherry" housing near MacDill Air Force base, Tampa, Florida, subject to real and chattel mortgages, praying therein that just compensation be ascertained and awarded, and for an order for surrender of possession effective Jan. 31st.

The defendant, alleging as grounds therefor the absence of allegations in the complaint that the statutory provisions had been complied with and that the amount deposited was so inadequate as to evidence bad faith and to constitute a fraud on them, filed a motion to vacate the declaration of taking or, in the alternative, to withhold the order of possession until an amended declaration of taking had been filed containing a proper estimate of just compensation which defendants alleged to be not less than $1,617,917.

A hearing was had and the district judge, stating that he would let the declaration of taking stand, with leave to amend to show that all conditions had been complied with and that the United States is entitled to an order of possession, the United States amended its complaint to show compliance with all statutory requirements and to fix March 31st as the effective date of the order to surrender possession, and at the same time amended its declaration of taking and its estimate and deposited additional funds to bring the total up to $400,500. Thereupon the defendants moved to dismiss the complaint as amended to vacate the declaration of taking as amended and to deny an order of possession, and the district judge entered the order under attack here.

ing possession of the property here involved to the United States under the provisions of the Act of Feb. 26, 1931, 46 Stat. 1421, 40 U.S.C., Sec. 258(a), and the Act of August 7, 1956, 42 U.S.C. Sec. 1594(a).

Two questions are presented for decision:

(1) Is Mandamus available to test the validity of the complained of order?

(2) Is the order invalid as claimed?

For the reasons hereafter briefly stated and upon the authorities cited in support, we think it clear that both questions must be answered in the affirmative.

As all, including the petitioner, agree, the order is not appealable. Dade County, Florida v. United States, 142 F(2) 230 (5 Cir.); Catlin v. United States, 324 U.S. 229; United States v. Richardson, 204 F(2) 552 (5 Cir.).

On the other hand, we are in no doubt that this is a proper case for the issuance of the alternative writ under the principle applied in Richardson's case, supra, in denying its issuance there:

> "* * * We are in no doubt that we have jurisdiction to issue an alternative writ in a proper case but these writs, as was said in Ex parte Fahey, 332 U.S. 258, 67 S.Ct. 1558, 1559, 91 L. Ed. 2041, 'should be resorted to only where appeal is a clearly inadequate remedy. * * * As extraordinary remedies, they are reserved for really extraordinary causes.' The present case may not be so characterized. The appellant contends that if a writ is not granted it is left without a remedy and that the power of reviewing will be defeated. Further that the order for exam-

ination constituted not only an abuse or discretion but an error as to the scope of the court's authority under the rules." p. 556.

Indeed, the order granting defendant's motion to vacate the declaration of taking presents a perfect case for relief by mandamus, since it was not the function, and it was beyond the power, of the court to make such an order, and therefore no question of the use or abuse of discretion is presented. This is settled by the cases,[3] as quotations from some of them will show.

In Dade County, Florida v. United States, 142 F(2) 230, this court, saying:

> "The court does not award the right of possession nor adjudge the title. * * * The law gives the right of possession, apparently without the necessity of any court order, though it is orderly and decent to get one."

goes on to say:

> "The statute declares: 'Upon the filing of said declaration of taking and the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands * * * shall vest in the United States of America * * * and the right to just compensation for the same shall vest in the persons entitled thereto.' It does not matter whether the court makes any order about it or not. The Act proceeds to say: 'and said compensation shall be ascertained and awarded in said proceeding

---

[3] Dade County Florida vs. United States, 142 F(2) 230 (5 Cir.); United States v. Carey, 143 F(2) 445; United States v. Hayes, 172 F(2) 677; United States v. Miller, 317 U.S. 369; United States v. 6.74 Acres of Land, etc., 148 F(2) 618; United States v. 44.00 Acres of Land, etc., 234 F(2) 410; United States v. 1997.66 Acres of Land, More or Less, 137 F(2) 8.

and established by judgment therein.' That is the real and substantial function of the court. That judgment is the essential and final one."

United States v. Dow, ... U.S. ... (June 9, 1958) is to the same effect. There the court said:

"The Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding 'ancillary or incidental to suits brought under other statutes,' Catlin v. United States, 324 U.S. at 240. Such a proceeding can be instituted either at the commencement of the condemnation suit under the 'other statues' or, as in this case, after such a suit has been commenced and either before or after the Government has taken possession. In both situations the Taking Act enables the United States to acquire title simply by depositing funds 'for or on account' of the just compensation to be awarded the owners, rather than by making payment pursuant to a court order. In those cases where the Government has not yet entered into possession, the filing of the declaration enables it to enter immediately and relieves it of the burden of interest from the time of filing to the date of judgment in the eminent domain proceedings. See United States v. Miller, 317 U.S. at 380-381.

"The scheme of the Taking Act makes it plain that when the Government files a declaration before it has entered into possession of the property the filing constitutes the 'taking'." (Emphasis supplied.)

In United States v. 6.74 Acres of Land, 148 F(2) 618, this court said:

"We conclude that under the Congressional Acts the necessity of the taking and the extent of the title to be taken are questions vested exclusively in the Secretary of War, and that upon the filing of the declaration of taking and the depositing of the

> money in the registry of the court neither appellee nor the court below could assail or in anywise limit the title which immediately passed to the Government thereunder."

Even respondents in effect concede in their brief that the order vacating the declaration of taking is on its face invalid. They undertake to avoid the consequences of the concession by arguing that the order, though on its face an order vacating the order of taking, an order beyond the court's power to make, should be treated as an order denying possession and referred for *its authority to the last two sentences of Sec. 258(a)*, Title 40:

> "Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

In his answer to the petition, the district judge gives expression to the view that the provision in the statute that the declaration of taking shall contain or have annexed thereto "a statement of money estimated by said acquiring authority to be just compensation for the land taken," means a good faith, fair, and honest estimate, and that this provision, taken with the further provision of the statute, "upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioners," authorizes the district judge, when he is of the opinion, on the record, that the amount

rendered does not constitute estimated just compensation as required by law, to find and hold that the declaration of taking was not filed in good faith but arbitrarily, and, on the basis of that finding, to vacate the declaration and refuse the requested order of possession.

With deference to the contrary views of the district judge, we deem the settled law to be that the purported bad faith exception to the rule of finality of the administrative estimate of just compensation does not exist, that, in short, the courts have no jurisdiction to review the amount of estimated compensation, none to set aside or vacate a declaration of taking, none to refuse a declaration of possession on the grounds asserted here. If the law were otherwise, a district judge, under the guise of determining whether the declaration of taking was in good faith and the amount tendered sufficient to escape the charge that it was arbitrary or fraudulent, could superintend the whole act of taking, vesting title, and acquiring possession, and thereby prevent its accomplishment unless the amount estimated measured up to his idea of what that amount should be. This court, in United States v. 6.74 Acres of Land, supra, has held precisely to the contrary. Cf. Berman v. Parker, 348 U.S. 26 and Starr v. Nashville, 354 U.S. 916.

The nature and purposes of the Declaration of Taking Act were described as follows in United States v. Miller, 317 U.S. 369, 381:

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former

> owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property. The Act recognizes that there may be an error in the estimate, and appropriately provides that, if the judgment ultimately awarded shall be in excess of the amount deposited, the owner shall recover the excess with interest. * * *" (Emphasis supplied.)

In the same case, the Supreme Court thus rejected the argument advanced here that the amount of the estimated compensation was a matter of the court's concern:

> "The payment is of estimated compensation; it is intended as a provisional and not a final settlement with the owner; it is a payment 'on account of' compensation and not a final settlement of the amount due. To hold otherwise would defeat the policy of the statute and work injustice; would be to encourage federal officials to underestimate the value of of the property with the result that the Government would be saddled with interest on a larger sum from date of taking to final award, and would be to deny the owner the immediate use of cash approximately the value of his land."

The statute itself is clear. It provides that the declaration of taking contain a statement of the sum of money "estimated by said acquiring authority to be just compensation for the land taken." Congress plainly gave the acquiring authority, not the courts, the function of estimating just compensation for this purpose. And the lack of court review is evident from the fact that when the declaration is filed and the deposit made in court "title to the said lands * * * shall vest in the United States, and said lands shall be deemed to be condemned * * *." Had Congress intended court review of the declaration or the amount of the estimate it

would have provided for some court action by way of approval before title passed. It did not require any court action in this particular. Likewise, because it did not contemplate any court action, it made no provision for response by the condemnee or even for notice prior to vesting of title.

It should be noted that the deposit in no way affects substantial rights of land owners. Catlin v. United States, supra, and that the estimate in no way binds them as to just compensation, indeed has "no bearing whatsoever on value." Chapman v. United States, 169 F(2) 641. In short, all the decisions show that the estimating and tendering is within the control of the government and that no one has the constitutional right to receive just compensation before the property is taken. United States v. Dow, supra, and the numerous cases holding the same way.

The order complained of is erroneous and may not stand. Since, however, the district judge has stated in his response, "Of course, I will abide by any order entered in the premises," and it is not our practice to direct a writ to issue against a district judge, the clerk will furnish a copy of this opinion to the district judge for his guidance, and no formal writ will issue.

/S/ Edward W. Wadsworth

A true copy
Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals,
Fifth Circuit,
New Orleans, Louisiana

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Office-Supreme Court, U.S.
FILED
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JAMES R. BROWNING, Clerk

No. 373

In the Supreme Court of the United States

October Term, 1958

CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, STATE OF FLORIDA; TAMPA BAY GARDEN APARTMENTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

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PERRY W. MORTON,
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In the Supreme Court of the United States

October Term, 1958

No. 458

CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, STATE OF FLORIDA; TAMPA BAY GARDEN APARTMENTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, dated March 27, 1958 (Pet. App. 1-5), is reported at 161 F. Supp. 424. Its opinion of May 12, 1958, reported at 161 F. Supp. 426-427, is printed as an appendix to this brief (*infra*, pp. 12-14). The opinion of the court of appeals (Pet. App. 6-14) appears at 257 F. 2d 844.

JURISDICTION

The judgment of the court of appeals was filed on August 1, 1958. The petition for a writ of certiorari

was filed on October 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the district court had acted beyond its powers in undertaking to review the adequacy of estimated compensation deposited by the United States in conjunction with the Government's filing of a declaration of taking.

STATUTES INVOLVED

Section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a, provides in part:

> In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> * * * *
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, * * *.

* * * *

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Section 4 of the Declaration of Taking Act (40 U.S.C. 258d) provides:

The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

Section 512 of the Housing Act of 1956, Act of August 7, 1956, 70 Stat. 1091, 1111, 42 U.S.C., Supp. V, 1594a, amending Section 404 of the Housing Amendments of 1955, provides, in part, as follows:

> (c) Condemnation proceedings instituted pursuant to this section shall be conducted in accordance with the provisions of the Act of August 1, 1888 (25 Stat. 357; 40 U.S.C., sec. 257) as amended, or any other applicable Federal statute. Before any such condemnation proceedings are instituted, an effort shall be made to acquire the property involved by negotiation. In any condemnation proceedings instituted pursuant to this section, the court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been filed, and a deposit of the amount estimated to be just compensation has been made, under the first section of the Act of February 26, 1931 (46 Stat. 1421), providing for such declarations. Unless title is in dispute, the court, upon application, shall promptly pay to the owner at least 75 per centum of the amount so deposited, but such payment shall be made without prejudice to any party to the proceedings. * * *

STATEMENT

This case involves the acquisition by condemnation of the lessees' interest in so-called "Wherry" housing located near MacDill Air Force Base, Tampa, Florida. The housing was constructed upon federal property under long-term leases executed in 1949 and subsequent years, subject to rental and other limitations,

for the purpose of housing military and civilian personnel and their dependents. See *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253. Congress has authorized acquisition of such projects by the United States subject to stated conditions. If efforts to acquire by negotiation prove fruitless, condemnation proceedings may be instituted (Section 512 of the Housing Act of 1956, *supra*). The statute further provides that the court shall not order a surrender of possession until a declaration of taking has been filed and estimated compensation deposited in court. Finally, it directs that, unless there is a title dispute, 75% of the deposit shall be paid promptly to the owner.

The Government's complaint, filed January 29, 1958, was one to acquire the outstanding leasehold interests, subject to outstanding mortgages, of Tampa Bay Garden Apartments and Tampa Bay Manor, Inc., both Florida corporations, together with various access roads, water and sewer rights of way, etc. A declaration of taking, executed on January 17, 1958 by the Assistant Secretary of the Air Force, was filed, and estimated compensation totaling $100,000 was deposited in court. The complaint asked that possession be delivered on January 31, 1958.

On January 29, the two corporations moved to vacate the declaration of taking and to prevent the entry of an order of possession, alleging that the estimate of just compensation was arbitrarily and capriciously made and was so inadequate as to constitute the perpetration of a fraud on the condemnees. Attached was a letter written in July of 1957 by the

Department of Defense to the Chairman of the Armed Services Committee of the Senate which established "Formula Cost" of the project under the Housing Act of 1956 as $1,617,917. At a hearing on January 29, the court declined to enter an order of possession stating that "they are going to have to reconcile that [the estimated compensation and the July 1957 figure] before the Court will issue an order of possession," and that "The Court has got to arrive at some reasonable figure here."

In February, petitioners moved to dismiss the complaint and again sought to vacate the declaration of taking. The Government amended its complaint to allege that efforts to acquire the interests involved by negotiation had been unsuccessful. In early March, an amendment to the declaration of taking was filed increasing the deposit to $400,500. Petitioners' motions to vacate and to dismiss were renewed.

By order of March 27, 1958, the motion to dismiss was denied, but the motion to vacate the declaration of taking was granted and the United States given 60 days in which to file an amended declaration of taking. In its opinion, the district court held that it had jurisdiction to determine whether the amount of deposit was arrived at in good faith and that, under the facts of this case, "the Court could under no theory hold that the sum of $400,500.00 was just compensation arrived at in good faith for the taking of the above Defendants' interest in the properties described in the Complaint, as amended, and in the Declaration of Taking, as amended."

The United States moved to set aside the order, submitting the affidavit of an Assistant Secretary of the Air Force reciting that the Department of Justice had obtained a fair market value appraisal of $400,500 from Mr. William W. Mollan, a member of the American Institute of Real Estate Appraisers, and that accordingly the Air Force had transmitted to the Department of Justice estimated compensation in that amount. This motion was denied on May 12, the court filing a second opinion in which it reasserted the power to review the adequacy of the deposit.

Upon petition of the United States, the court of appeals held that the district court had no jurisdiction to vacate a declaration of taking or to refuse to order delivery of possession because it deemed the amount of estimated compensation to be inadequate, and that action purporting to do so could be corrected by mandamus. No formal writ was issued since the district judge, in answering the petition, had stated he would abide by any order entered. On August 22, 1958, District Judge Whitehurst, to whom the case had been transferred, ordered that possession be delivered effective September 1, 1958 (Appendix, *infra*, p. 14).

ARGUMENT

1. If, as we argue below, the district court's order was beyond its jurisdiction, it was within the power of the court of appeals to entertain an application for relief by way of mandamus. Petitioners suggest that there was no occasion for seeking an extraordinary remedy because the Government could have ob-

tained possession by depositing an amount deemed satisfactory by the district court. But compliance with an unauthorized order can hardly be deemed an adequate "remedy," especially when the consequences of such compliance might be to jeopardize public rights. The Housing Act (*supra*, p. 4) calls for an immediate and substantial distribution of the deposit. Wherry housing, it should be noted, was constructed by corporations organized for that purpose and possessing no other assets. There is thus no practical assurance that if advance payments were made in amounts exceeding the sum ultimately determined to constitute just compensation recoupment would be available to the Government. In such circumstances, the court of appeals could certainly consider, on application for mandamus, the power of the district court to take the extraordinary step of vacating a declaration of taking. See generally *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 26; *Ex Parte United States*, 287 U. S. 241; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 27-30.

2. The court of appeals' holding that the courts are not authorized to determine the amount to be deposited was clearly correct. The Declaration of Taking Act empowers the acquiring agency, not the courts, to estimate just compensation. Congress defined the powers of the court in regard to orders of possession, etc., in the concluding paragraph of Section 1 of the Act (*supra*, p. 2). No authority to review the amount of the estimate is conferred. And the fact that title vests upon the mere filing of the

declaration, without court approval or opportunity of the condemnees to object, shows that Congress did not contemplate review proceedings. The debates likewise show an intention to rely upon administrative authorities to make the estimates. 74 Cong. Rec. 778, 779.

The decisions of the courts of appeals uniformly hold that, although the judiciary may dismiss proceedings for lack of authority to condemn, there is no power to vacate a declaration of taking for such reasons as disagreement with the amount of the deposit. *United States* v. *6.74 Acres of Land*, 148 F. 2d 618 (C. A. 5); *United States* v. *Hayes*, 172 F. 2d 677, 679 (C. A. 9); *United States* v. *Carey*, 143 F. 2d 445, 450 (C. A. 9); *United States* v. *Certain Parcels of Land*, 215 F. 2d 140 (C. A. 3). Cf. *Berman* v. *Parker*, 348 U. S. 26.

Petitioners apparently assume that landowners have a vested right to a deposit. But the entire Declaration of Taking Act procedure is a creature of statute and not a constitutional requirement. Cf. *United States* v. *Dow*, 357 U. S. 17. That Act had two purposes: (1) to alleviate hardships upon landowners by giving them estimated compensation on an interim basis; (2) to enable the Government to proceed with its project and to reduce its interest liability. *United States* v. *Miller*, 317 U. S. 369. Congress never reported, however, to have the courts play a role in the matter of estimation. Petitioners' effort to read an exception into the statutory scheme whenever it is alleged that the estimate was not made in

good faith would mean in practical effect, as the court of appeals observed, that a district judge "could superintend the whole act of taking, vesting title, and acquiring possession, and thereby prevent its accomplishment unless the amount estimated measured up to his idea of what that amount should be" (Pet. App. 12).

Since the estimate has no effect on the final award, no substantial right of the landowners is denied by the decision below. If the estimate falls short of the ultimate award, the condemnee is compensated for the delay in payment by the allowance of interest. On the other hand, court review of the amount of the deposit would seriously impair the effectiveness of the statutory procedures, which aim at expedition. Examination of the deposit would require, in effect, that there be two trials on the issue of compensation.[1]

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[1] Although there is no occasion to reach the question, we deny that there is any basis for charging that the Government estimate was made in bad faith. The affidavit of the Assistant Secretary of the Air Force that the $400,500 deposit was based on an independent appraisal stands unchallenged. At most, the facts would indicate disagreement between that appraiser and those who arrived at the $1,617,917 figure and the $1,080,000 amount. Under any view, that is not bad faith. And the fact is that the two figures in excess of a million dollars are not estimates of just compensation or fair market value based upon an appraisal. They were based upon a formula prescribed by Congress as the *maximum* for the possible purchase of Wherry housing—a formula which gives primary emphasis to estimated replacement cost. See Section 404 of the National Housing Act as amended by the Housing Act of August 7, 1956, 70 Stat. 1091, 1111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

NOVEMBER 1958

APPENDIX

Opinion of the District Court, dated May 12, 1958.

BARKER, District Judge:

This cause came on to be heard upon Motion of the United States to set aside the Court's Order vacating the Declaration of Taking, as amended, and for a rehearing of said Order. The Court has examined the said Motion and considered the brief attached to and made a part of said Motion. The Government in its Motion and in its brief raises 3 grounds for the granting of the relief sought by said Motion.

First: That the Court is without jurisdiction in this cause to set aside the Declaration of Taking.

Second: That the estimated amount of compensation as determined by the Secretary of Defense is conclusive upon the Court and that the Court has no right to hear or determine whether the amount deposited with the Declaration of Taking is estimated just compensation.

Third: That there is a difference between estimated just compensation and just compensation.

The arguments raised in said Motion were the same as argued before the Court at the time of the entry of its Order vacating the Declaration of Taking, as amended. The Statute under which this proceeding was brought (Title 42, Sec. 1594a (a-c), U.S.C.A.) requires that an estimated just compensation must be deposited in order for the Declaration of Taking to be effective. The Court cannot agree with the United States that it was the intention of Congress to authorize the Secretary of Defense to deposit any sum of money he might see fit without the privilege

of the landowners to have the same reviewed by the Courts. If the amount of estimated just compensation is solely within the discretion of the Secretary of Defense, the United States in filing a Declaration of Taking could be permitted to deposit the sum of $1, no matter how valuable the property taken might be. It is significant that the Statute provides that estimated *just* compensation must be deposited. If it were the intention of Congress that the estimate of compensation was solely within the discretion of the Secretary of Defense, why did Congress insert the word "*just*"? This Court is of the opinion that the insertion of the word "*just*" necessarily implies that Congress intended for the Court, in a litigated case, and especially where, as here, the issue of the lack of good faith was presented timely and amply supported by the letters of the United States which were admitted in evidence, to determine whether the sum deposited, with the Declaration of Taking, was an "estimate of just compensation."

The Court, in arriving at its decision in entering the Order to vacate the Declaration of Taking, considered that the various valuations placed upon the leasehold interest, sought to be condemned, by the Government, in the letters introduced in evidence, were estimates on the part of the Secretary of Defense as to just compensation for the property sought to be taken, and, as pointed out in the memorandum opinion heretofore filed, there is great disparity between the several estimates of just compensation made by the Government. It is, therefore, the opinion of the Court that the Motion of the United States, as hereinbefore described, should be denied. An Order in accordance with this opinion will be entered.

Order of the District Court, filed August 22, 1958.

THIS CAUSE coming on this day to be heard pursuant to Notice, and counsel for the respective parties having argued the same before the Court, and the Court being advised in the premises, it is

ORDERED that the defendants do surrender possession of the property described in the complaint as amended effective as of 12:01 A. M., September 1, 1958. And it is further

ORDERED that all other matters presented by said Motion are reserved for further consideration and decision by the Court.

DONE AND ORDERED in Chambers at Tampa, Florida, this 22nd day of August, 1958.

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